In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-108

TROY'S WELDING, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Following a hearing, the United States District Court for the District of New Mexico ordered petitioner Troy H. Elliott to comply with an Internal Revenue Service summons (R. 20-22).[1] The court of appeals affirmed (Pet. App. 1-7).

The summons (R. 11-12) required Troy H. Elliott, as president of Troy's Welding Shop, Inc., to produce specified corporate records for the years 1971 through 1973, as part of an investigation of the tax liability of Elliott for those years. Although Elliott appeared in response to the summons, he refused to produce the summoned records (R. 7, 10; Supp. R. 8).

[1] "R." and "Supp. R." refer respectively to the appendix and supplemental appendix in the court of appeals.

At the ensuing hearing in the district court, the Internal Revenue Service agent who issued the summons testified concerning its issuance and Elliott's refusal to comply (Supp. R. 3-8). Elliott, who appeared *pro se*, did not cross-examine the witness, stating that he had no questions (Supp. R. 9). He put on no evidence (Supp. R. 12) but did state that: (1) there had been no order with which the corporation could comply and they had never had a hearing (Supp. R. 11); (2) only the rare taxpayer would be likely to know that he could refuse to produce records, nor would he be likely to make any distinction between a revenue agent and a special agent (Supp. R. 11-12); (3) he was not required to produce the records unless they were specified in detail (Supp. R. 12); (4) he had not earned any "legal money" (Supp. R. 18); (5) he was not willing to testify against himself (Supp. R. 18-19); (6) he was not willing to have his property seized without due process of law (Supp. R. 19); (7) he was not willing to pay more taxes than were due and "see special-privileged persons or groups pay little or no taxes" (*ibid.*); and (8) he had not been given the warnings required by *Miranda* v. *Arizona*, 384 U.S. 436 (Supp. R. 21).

Thereafter, petitioners Elliott and his corporation filed a motion (R. 18-19) seeking an injunction "for protection of Constitutional and Civil Rights." The motion asserted that the summons was issued without a court order; that the Internal Revenue Service was on a "fishing expedition"; that "the witness or any party in interest may attack Summons before the hearing officer"; and that "either the taxpayer or any affected party might restrain compliance * * * until compliance is ordered by a Court of competent jurisdiction." The district court thereupon ordered the summons enforced.

Petitioners present twenty-five questions for this Court's consideration (Pet. 5-10). The primary reason they advance for Elliott's refusal to comply with the summons appears to be their general dissatisfaction with the tax structure and the methods for assessing and collecting taxes (see Pet. 5-9 (Questions 1, 3, 4, 5, 12, 13, 14, 19, 20, 24), 10-11). But these questions are not germane to the question whether the Internal Revenue Service could use its summons power to examine corporate records in order to determine petitioner Elliott's correct tax liability.

Petitioners also appear to assert (Pet. 6-7, 9-10 (Questions 3, 7, 25), 13-15) that the summons was not being used for a proper purpose. However, they bear the burden of showing an abuse of process, *United States* v. *Powell*, 379 U.S. 48, 58, and despite the opportunity to do so,[2] petitioners presented no evidence. At all events, the evidence established that the agent was engaged in an investigation directed toward establishing the correct income tax liability of Elliott for the years 1971 through 1973 (R. 9; Supp. R. 5) and that the summoned records were necessary for such a determination (R. 10; Supp. R. 6-7). Petitioners do not allege that the corporate records sought (see R. 11)—relating as they do to financial dealings between the corporation and the taxpayer—were not relevant to the investigation. There was accordingly ample support for the conclusion of the court of appeals that "the record has not revealed any showing of impropriety or bad faith on the part of IRS" (Pet. App. 6).

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[2]Petitioner was given an opportunity to cross-examine the issuing agent and to present his own evidence. He was thus afforded an adversary hearing and cannot now complain that the enforcement hearing lasted only 33 minutes (see Pet. 6 (Question 6), 11-13, 15) in light of his failure to avail himself of the opportunity to cross-examine the agent or to present his own evidence. Similarly, his questions relating to the lack of a jury trial (see Pet. 6-7, 9 (Questions 2, 10, 21)) are without merit. There is no right to a jury trial in a summons enforcement proceeding. *Kennedy* v. *Rubin*, 254 F. Supp. 190, 194-195 (N.D. Ill.). See also *United States* v. *Louisiana*, 339 U.S. 699, 706. In any event, petitioner made no demand for trial by jury. See Rule 38(d), Federal Rules of Civil Procedure.

Finally, petitioner Elliott urges (Pet. 6-8 (Questions 4, 7, 15), 11-13, 15) that the summons violates his constitutional rights. However, the summons sought only corporate records and thus was not barred by petitioner's personal privilege against self-incrimination. See, *e.g., Bellis* v. *United States*, 417 U.S. 85, 88-89; *Curcio* v. *United States*, 354 U.S. 118, 122; *Grant* v. *United States*, 227 U.S. 74, 79-80; *Wilson* v. *United States*, 221 U.S. 361, 384-385. Moreover, since the summons only sought specified records for a three-year period, it was sufficiently narrow to meet the requirements of the Fourth Amendment. See, *e.g., Wilson* v. *United States, supra,* 221 U.S. at 376; *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 195, 208-209.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1975.